Ho Cheng Kwee v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) – CRIMINAL APPEAL NO 4 OF 1987
WEE CHONG JIN CJ, SINNATHURAY AND CHUA JJ
10 NOVEMBER 1988

Criminal Law – Dangerous drugs – Trafficking in – Appellant recanted version given to investigating officer that he was conveying drugs to third party – Defence given at trial was that drugs were entirely for his own consumption – Rejection of defence by trial judges – Whether trial judges correct in so doing

The appellant was convicted by the High Court on a drug trafficking charge under the Misuse of Drugs Act (Cap 185, 1985 Ed). He appealed to the Court of Criminal Appeal against his conviction and sentence.

During police investigations, the appellant admitted that the two packets of diamorphine (weighing 144.52 gm) found in his trousers were meant for delivery to a third party and that he was to be paid a sum of money for conveying the drugs. However, during the trial, the appellant recanted the version given to the investigating officer as regards the purpose of the diamorphine and said instead that the two packets were meant entirely for his own consumption. At the appeal hearing the sole issue was whether the trial judges were correct in rejecting the appellant's defence that he was a drug addict and that the two packets of diamorphine were entirely for his own consumption.

Held, dismissing the appeal: The presumption of trafficking under s 17(c) of the Misuse of Drugs Act (Cap 185, 1985 Ed) is a statutory and rebuttable presumption. The trial judges were right in rejecting the appellant's defence that the contents of the two packets of diamorphine were entirely for his own consumption. The court agreed with the trial judges that the quantity of diamorphine found on the appellant was too large for his own consumption.

Case referred to
1 *Ong Ah Chuan* v *PP* [1981] 1 MLJ 64 (refd)

Legislation referred to
Misuse of Drugs Act (Cap 185, 1985 Ed) ss 5(a), 17(c)

Loh Lin Kok for the appellant.
Lee Seng Lip for the Public Prosecutor.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): The appellant, Ho Cheng Kwee, was charged before, tried and convicted by the High Court on 1 to 2 April 1987 on the following charge :

> You, Ho Cheng Kwee, are charged that you, on or about 15 October 1985 at about 8.40 am at Woodlands Customs Checkpoint, Singapore, not being authorized by the Misuse of Drugs Act (Cap 185, 1985 Ed) or any regulations made thereunder to import a controlled drug, did traffic, to wit 144.52 gm of diamorphine, which is a controlled class A drug as specified in Part I of the First Schedule to the aforesaid Act, and you have thereby committed an offence under s 5(a) and punishable under s 33 of the said Act.

The appellant appealed to this court against the conviction and sentence. At the conclusion of the hearing, we dismissed his appeal. We now give our reasons.

The facts as adduced by the prosecution are not in dispute. In 1985 and before his arrest on 15 October 1985, the appellant was working as a tour guide and was operating mainly in Haadyai, South Thailand. From time to time he returned to Singapore by bus.

On 14 October 1985, the appellant left Haadyai by bus. At the Woodlands checkpoint, in the course of customs clearance, the appellant was singled out for a body search. Two packets of white powdery substance wrapped in plain white paper were found in the two back pockets of his trousers. When he was questioned as to the contents of the packets, he replied in Hokkien that they were 'peh hoon' (a term in the Hokkien dialect for heroin). He admitted that the two packets belonged to him. In addition, a packet of 'Krong Thip' cigarettes was found in his shirt pocket. Four out of the 13 sticks of cigarettes were found to be spiked with a white powdery substance.

The appellant was arrested and the exhibits seized. He was referred to the investigating officer, Assistant Superintendent of Customs (ASC) Long Foo Liew. ASC Long's evidence was that when he questioned the appellant, the latter's reply was that the two packets contained 'peh hoon' and explained that by 'peh hoon' he meant that the contents were 'tok pin' (a term in the Hokkien dialect for controlled drugs).

The appellant went on to say that the two packets were handed to him on 13 September 1985 by an unknown Thai national at a coffee-shop in Haadyai. He had agreed with a person named Hay Yee to collect the drug in Haadyai and to deliver it to Hay Yee at the Redhill hawker centre for a fee of $1,000. As each packet weighed about 100 gm, ASC Long asked the appellant whether he knew the consequences of bringing into Singapore such a large quantity of controlled drugs. The appellant replied 'see' in the Hokkien dialect which translated means 'death'. As for the spiked cigarettes, the appellant said that they were for his own consumption.

As the appellant indicated that he was to meet Hay Yee at the Redhill hawker centre at about 1 pm on the same day, ASC Long led a party of customs officers together with the appellant to the hawker centre. However, no contact was made. Later the same evening, the appellant voluntarily made a cautioned statement to ASC Long. In his statement, he repeated what he had earlier told ASC Long.

According to the undisputed analysis carried out by Dr Chow Shui Tse, a senior scientific officer, the two packets seized from the appellant contained not less than 144.52 gm net of diamorphine. In his opinion, the gross contents of the two packets totalling 192.68 gm could be converted into heroin no 3 with a 'street' value of about $192,000.

A sample of the appellant's urine was also taken and was found to contain traces of morphine.

The appellant's defence was essentially that the two packets of heroin were entirely for his own consumption. According to his evidence, in 1985 and until his arrest on 15 October 1985, he was working as a tour guide in Haadyai, South Thailand where he also lived. He was not of substantial means. He acquired the habit of smoking cigarettes spiked with heroin in mid-April 1985. By August 1985, he said he was buying heroin in plastic phials. Each plastic phial of heroin which cost the equivalent of S$24 could be used to spike his 'Krong Thip' cigarettes and last him for about five to six days. He had bought the phials of heroin on five or six occasions. However, this method of buying heroin was rather expensive. A Thai friend offered to sell him heroin in packets at 24,000 bahts per packet but as he did not intend to take up the offer he replied at random, not expecting to be taken seriously, that he would buy the heroin for 18,000 bahts. His friend unexpectedly accepted and told him that the heroin would be handed to him on 13 September 1985 at a coffee shop in Haadyai. The appellant took delivery of the two packets of heroin for which he paid 18,000 bahts or $1,500 in equivalent Singapore currency. He then divided the packet of heroin into two packets which could fit into the two back pockets of his trousers. He kept from his wife the fact that he was smoking heroin as she had threatened to leave him if he continued in his bad habit. He also said that he had never been subjected to any body search in all his trips up and down the Causeway since the age of eighteen.

The appellant admitted that on 15 October 1985 he was searched and the two packets of heroin were seized from the two back pockets of his trousers. He said he needed the heroin to spike his cigarettes. He also admitted telling ASC Long that he was carrying the heroin for delivery to one 'Hay Yee'. He said he was to be paid $1,000 for conveying the heroin. He also admitted telling ASC Long that the spiked cigarettes were for his own consumption. He also confirmed the voluntariness of the cautioned statement (exh P33).

During the trial, the appellant recanted the version he had given to ASC Long, the investigating officer, as regards the purpose of the two packets of heroin. He said that the two packets of heroin were meant entirely for his own consumption. He explained that he had initially told the investigating officer that the heroin was for his own consumption. However, the investigating officer abused him and threatened to beat him up or refer him to the Central Narcotics Bureau. In the face of these threats, the appellant made up the story which was told to the investigating officer. He thought that he could shift the blame onto another person. When he mentioned 'Hay Yee' he knew that at that time Hay Yee had already passed away.

Under s 17(c) of the Misuse of Drugs Act (Cap 185, 1985 Ed), any person who is proved to have had in his possession more than 2 gm of diamorphine (heroin) in any controlled drug shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.

This is a statutory and rebuttable presumption. In *Ong Ah Chuan* v *PP*[1] at p 69, Lord Diplock said:

> Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s 3 (now s 5 of the Misuse of Drugs Act (Cap 185, 1985 Ed)).

The trial judges were satisfied that the appellant had failed on a balance of probabilities or on a preponderance of evidence to rebut the statutory presumption. They rejected the appellant's defence that the two packets of diamorphine were for his own consumption. The trial judges found the appellant's revised version given in court to be incredible. They were of the opinion that the quantity of diamorphine was too large for the appellant's own consumption and furthermore, the diamorphine was of a high grade quality with a 'street' value of some $192,000. The trial judges found that the appellant, not being at all well-circumstanced at the material time, could not have afforded that much high grade diamorphine.

At the hearing of the appeal before us, counsel for the appellant submitted that the sole issue is whether the trial judges were correct in rejecting the appellant's defence that he was a drug addict and that the two packets of diamorphine were entirely for his own consumption.

In our judgment, the trial judges were right in rejecting the appellant's defence that the contents of the two packets of diamorphine were entirely for his own consumption. We agree with them that the quantity of diamorphine found on the appellant was too large for his own consumption. The appellant's own evidence was that in all his eight previous visits to Singapore in 1985, his longest stay was a maximum duration of eight days during which he needed two phials of heroin. His explanation for carrying such a large quantity of diamorphine was that he had no place in Haadyai to keep them; that he had to keep them away from his wife and that his earlier trip in September 1985 during which he was not searched at all had somehow lulled him into carelessness. The trial judges did not believe him. We see no reason to disagree with them. The appellant admitted that he knew the penalty for trafficking in controlled drugs. Yet he chose to risk detection, prosecution and punishment by

bringing into Singapore such a large quantity of diamorphine merely for those reasons.

For the above reasons, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Loh Lin Kok & Co.*

Reported by *Ng Sheau Jiuan*

MTU Asia Pte Ltd v Brightside-Woh Hup

HIGH COURT (SINGAPORE) – SUIT NO 2554 OF 1986
CHAN SEK KEONG JC
27 JULY 1987

Contract – Frustration – Defence of – Defendants requested suspension of delivery of equipment under supply contract with plaintiffs – Plaintiffs not agreeable to indefinite suspension of supply contract – Writ issued for breach of contract – Whether defendants' defence of frustration due to termination of subcontract between defendants and third party viable – Whether project that defendants were involved in was fundamental to performance of supply contract

The defendants were subcontractors of Turner (East Asia) Pte Ltd ('Turner') who were the main contractors employed by Gateway Land Pte Ltd in a development project known as the Gateway Project. By a subcontract, the defendants agreed to carry out and complete certain subcontract works. In performance of part of their obligations under the subcontract, the defendants agreed to buy from the plaintiffs and the plaintiffs agreed to supply to the defendants ('the supply contract') certain equipment. Subsequently, the defendants telexed the plaintiffs to suspend all manufacture/delivery of the equipment. The plaintiffs informed the defendants that they would not agree to an indefinite suspension of the contract and required the defendants to reply as to when they could accept delivery of the equipment. The defendants failed to reply and as a result, the plaintiffs commenced proceedings for damages for breach of contract against the defendants.

The assistant registrar gave unconditional leave to the defendants to defend the action. The plaintiffs appealed to the High Court. The defendants' main contention was that they were prevented from accepting the equipment purchased from the plaintiffs because of the termination of the subcontract between the defendants and Turner, which event, being beyond the control of the defendants, amounted in law to frustration of the supply contract. The defendants submitted that the supply contract needed for its foundation the continuing existence of the Gateway Project and that the cancellation of the Gateway Project had frustrated the supply contract.

Held, allowing the appeal:

(1) Taking into account the additional facts disclosed in Suit No 3599 of 1985 (in which the defendants had sued Turner for payment of sums payable under the subcontract) frustration as a defence was not available to the defendants on the ground, firstly, that the defendants' reason for not accepting delivery of the equipment was that Turner had terminated the main contract and had stopped work and not because the Gateway Project had ceased to exist. Also, any default of Turner in respect of their obligations under the subcontract was a contingency which had been provided for in cl 21 of the subcontract. Secondly, in the circumstances of this case, counsel's argument that the continued existence of the Gateway Project formed the basis of the supply contract had no factual or legal basis.

(2) In the court's view, the nature of the supply contract and the surrounding circumstances could not justify a court in implying that the continued existence of the Gateway Project was fundamental to the performance of the supply contract by either party.

(3) The main contract was not frustrated but merely breached. The determination of the main contract led to the determination of the subcontract by its own terms. It follows that the subcontract could not have been frustrated. That being the case, there was no basis for arguing that the supply contract was frustrated.

Cases referred to

1 *Levey & Co* v *Goldberg* [1922] 1 KB 688 (refd)
2 *Krell* v *Henry* [1903] 2 KB 740 (refd)
3 *Davis Contractors Ltd* v *Fareham Urban District Council* [1956] AC 696 (refd)

Chan Kok Chye for the plaintiffs.
Chia Quee Khee for the defendants.

Cur Adv Vult

Chan Sek Keong JC: On 6 March 1987, I allowed the appeal of the plaintiffs against the decision of the assistant registrar granting unconditional leave to the defendants to defend the plaintiffs' claim for damages for breach of contract.

As the defendants have appealed against my decision, I would like to set out the facts and elaborate on the grounds of decision which I gave in summary form on 6 March 1987.

The facts are simple. The defendants were subcontractors of Turner (East Asia) Pte Ltd ('Turner') who were the main contractors employed by Gateway Land Pte Ltd ('the employers') in a development project known as the Gateway Project at Beach Road, Singapore. By a subcontract dated 2 November 1983 ('the subcontract'), which was supplemental to the main contract between Turner and the employer, the defendants agreed to carry out and complete certain subcontract works at the price of $45,620,000 on the terms and conditions contained therein.

The subcontract works comprised the following:

(a) air-conditioning and mechanical ventilation services;
(b) electrical services;
(c) plumbing and sanitary services;
(d) fire services.